82-1060

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT P. GOUVEIA,

Petitioner,

vs.

NAPILI KAI, LTD.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent NAPILI KAI, LTD., respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Supreme Court of the State of Hawaii in this case. That opinion is appended as Appendix "A" to the Petition for Writ of Certiorari.

QUESTION PRESENTED

Whether the bare allegation that a plaintiff has suffered emotional distress as a result of employment discrimination that is prohibited by the National Labor Relations Act is sufficient to exempt the plaintiff's claim from Federal preemption.

STATEMENT OF THE CASE

Respondent Napili Kai, Ltd., a Hawaii corporation (hereafter "Napili Kai"), operates a resort facility at Napili, Maui, Hawaii. Petitioner Gouveia was employed by Napili Kai on approximately March 3, 1975, to work in Napili Kai's personnel and accounting department.

During December 1976, Gouveia sought to negotiate a new hourly wage rate which he felt would be consistent with union scale, together with the other employee benefits. Gouveia also attempted to engage in collective bargaining with Napili Kai on behalf of himself and other Napili Kai employees who were similarly situated. As a direct and proximate result of these actions, Napili Kai terminated Gouveia's employment on December 20, 1976.

On February 9, 1977, Gouveia filed a "Charge Against Employer" with the National Labor Relations Board. The charge alleged that Gouveia's termination was in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (29 U.S.C. §158(a)(1), (3)).

On May 16, 1977, Gouveia and Napili Kai entered into a settlement agreement under the auspices of the NLRB to resolve the unfair labor practice charge which Gouveia had filed against Napili Kai. Under the terms of that settlement agreement, Napili Kai paid to Gouveia the sum of $2,000 in back pay, which amount "made whole the employees named below," who was Petitioner Gouveia. On August 4, 1977, the Regional Director for Region 20 of the National Labor Relations Board closed the unfair labor practice charge case against Napili Kai inasmuch as Napili Kai had complied

with all of the requirements of the settlement agreement.

Three months after the unfair labor practice case was closed, Gouveia caused a complaint to be issued which initiated the instant case. In his complaint, Gouveia alleged that as a direct and proximate result of his attempts to negotiate a higher hourly wage rate and engage in collective bargaining, Napili Kai terminated Gouveia. Gouveia further alleged that his termination was wilfully malicious, and intended to cause severe and substantial mental distress.

REASONS WHY THE WRIT SHOULD BE DENIED

Gouveia, in his complaint, alleged as the basis for his claim the following misconduct:

> 14. As a direct and proximate result of Plaintiff attempting to

> negotiate an hourly wage rate consistent with union scale, together with other employee benefits, on or about December 20, 1976, Defendant terminated Plaintiff's employment with Defendant.

The foregoing allegation clearly constitutes conduct protected by the National Labor Relations Act, 29 U.S.C. §152 et seq. (hereafter "NLRA") as well as an unfair labor practice prohibited by the NLRA over which the National Labor Relations Board has exclusive jurisdiction (29 U.S.C. §157, 158(a)(1) and (3)). Therefore, as found by the Hawaii Supreme Court, Gouveia's cause of action is plainly preempted by the NLRA.

The National Labor Relations Act reflected a Congressional intent that labor disputes affecting interstate commerce were to be regulated under a

uniform federal law. This law was to be administered by the National Labor Relations Board having primary jurisdiction. The public policy expressed in the NLRA was that of preempting the original jurisdiction of state and federal courts as well as other tribunals to decide issues involved in a labor dispute in favor of a single federal agency. See Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41 (1938); Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940).

This Court devised a test for determining whether preemption should apply in Weber v. Anheuser Busch, Inc., 348 U.S. 468 (1955). The court there stated as follows:

> Where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy

> within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal act, may be reasonably deemed to come within the protection afforded by the act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance.

348 U.S. at 481.

Subsequently, in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 3 L.Ed.2d 775 (1959), this Court held that where activities are "arguably" protected by Section 7, or "arguably" prohibited by Section 8, only the National Labor Relations Board may make the initial determination whether the activity is protected, prohibited, or in the gap left without regulation by federal law. 359 U.S. at 245. The Court ruled that no other tribunal could deal

with arguably protected or prohibited activities by way of either injunction or damages.

The Garmon decision was reaffirmed by this Court in Sears, Roebuck and Company v. San Diego County District Council of Carpenters, 436 U.S. 206, (1978). In Sears, the Supreme Court noted that Garmon made two statements which have come to be accepted as the general guidelines for the permissible scope of state regulation of activity touching upon labor-management relations. The first related to activity which is "clearly" protected or prohibited by the federal statute. With respect to such conduct, the Supreme Court initially stated in Garmon, and reaffirmed in Sears, that:

> If the Board decides . . . that conduct is protected by §7, or prohibited by §8, then the matter is

> at an end, and the States are ousted of all jurisdiction.

436 U.S. at 187 n. 11.

In the instant case, the NLRB accepted jurisdiction over the unfair labor practice charge and supervised its settlement. Accordingly, under Garmon, as reaffirmed in the Sears case, "the matter is at an end and the states are ousted of all jurisdiction."

Even if the NLRB had not accepted jurisdiction over the conduct here at issue, the matter is nonetheless "arguably" protected or prohibited and hence preempted. Where conduct is "arguably" protected or prohibited, a careful analysis is required to determine whether preemption is appropriate or whether the conduct falls within one of the exceptions to the preemption doctrine.

This Court provided guidance in making this analysis in Farmer v. United

Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290 (1977). There, an individual union member sued a union as a result of ". . . a campaign of personal abuse and harassment in addition to continued discrimination in referrals from the hiring hall" (430 U.S. at 292). The Plaintiff, in his complaint, had alleged ". . . that the defendants had intentionally engaged in outrageous conduct, threats, and intimidation . . ." The complaint also alleged a continuing course of discriminatory conduct by the union (430 U.S. at 293). The union's campaign against its member included "frequent public ridicule," and "incessant verbal abuse." Although in Farmer the Supreme Court concluded that the suit for emotional distress was not preempted, the Court did not create a per se rule.

The Court rather found that three factors were determinative to determine exceptions to the preemption doctrine. First, that the underlying conduct which forms the basis of the state action is not protected by the National Labor Relations Act; second, that there is an overriding state interest in protecting citizens from the type of conduct complained of; and third, that there is little risk that the state cause of action will interfere with the effective administration of national labor policy. (430 U.S. at 298)

Unlike Farmer, the preemption doctrine precludes the instant case. With regard to the first factor, that the underlying conduct is not protected by the NLRA, Gouveia alleges on his complaint as follows:

> 13. In or about December, 1976, Plaintiff advised

Defendant of Defendant's aforesaid conduct and attempted to engage in collective bargaining with Defendant in connection therewith.

14. As a direct and proximate result of Plaintiff attempting to negotiate an hourly wage rate consistent with union scale, together with other employee benefits, on or about December 20, 1976, Defendant terminated Plaintiff's employment with Defendant.

The foregoing constitutes an allegation of retaliation and discriminatory interference with the exercise of Section 7 rights protected under the NLRA (29 U.S.C. §157). This conduct also constitues an unfair labor practice under Section 8(a)(1) and (3) of the National Labor Relations Act (29 U.S.C. §158(a)(1) and (3)). In fact, in the instant case, an unfair labor practice was filed and processed to

settlement by the NLRB. Thus, unlike the conduct complained of in Farmer, which included a campaign of personal abuse and harassment, as well as "outrageous conduct, threats and intimidation," the conduct here in issue was clearly both protected and prohibited activity under the NLRA.

The second factor set forth in Farmer was that there be "'an overriding state interest' in protecting residents from malicious libels, and that this state interest was 'deeply rooted in local feeling and responsibility.'" In the Farmer case, the underlying conduct, which included personal abuse, threats, and intimidation, was clearly this type of conduct. (See, e.g., Automobile Workers v. Russell, 356 U.S. 634 (1958)). A state does not have a legitimate interest in becoming involved in retaliation and discriminatory

interference with the exercise of Section 7 rights under the NLRA. Rather, Congress has vested this function in the NLRB and by so doing has preempted state courts from acting in this area.

The third factor enumerated by the Court was that there is little risk that the state cause of action will interfere with the effective administration of national labor policies. Clearly, a cause of action based on personal abuse, threats and intimidation would not interfere with the effective administration of national labor policy. There was no such conduct involved in this case. Rather, Gouveia's cause of action, which is premised on his termination because he sought to engage in collective bargaining, goes to the very heart of national labor policy and regulation.

The Farmer decision did not hold that claims for emotional distress are, as a matter of law, exempt from federal preemption. To the contrary, the Court expressly recognized that any such exemption would swallow the general rule since all acts of employer or union discrimination in employment opportunities could produce emotional distress. If a per se exemption to federal preemption were adopted, there would be nothing left to regulate under the NLRA. Accordingly, in order to avoid federal preemption, the alleged emotional distress must either be unrelated to the employment discrimination or else arise from the particularly abusive manner in which the employment discrimination occurred (430 U.S. at 305). Here, Gouveia's emotional distress was the direct result of employment discrimination. Furthermore, there are

no allegations of the "outrageous" conduct or prolonged abusive conduct found in Farmer, such as harassment, intimidation, threats, frequent public ridicule and incessant verbal abuse, that are required for an exception to federal preemption (430 U.S. at 305). Rather, the complaint merely alleges an unlawful termination which discriminated against Gouveia because of his exercise of his Section 7 right to engage in collective bargaining protected by the NLRA.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

DATED: Honolulu, Hawaii, March 31, 1983.

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